TEH AH KUAY v. PUBLIC PROSECUTOR.

[A. Cr. J. (Wilson, J.) December 5, 1952]

[K.L. — Selangor Criminal Appeal No. 55 of 1952 and 511]

Penal Code, ss. 420 and 511 Charge of cheating — Evidence of attempting to cheat.

The appellant was charged with and convicted of an offence of cheating contrary to section 420 of the Penal Code. The facts were as follows: On January 28th about 10 persons were playing a game of cards in the back portion of a coffee-shop. A police Lieutenant in the Criminal Intelligence Representative at Klang came and raided the shop. Some days later a Chinese, who stated he was a police Inspector, went to the shop and questioned one Lim Thong Chong, the coffee-shop keeper, about the gambling. Thong Chong was very worried and someone suggested to him he should see the appellant, which he did. He told the appellant his worries and 3 or 4 days later the appellant, according to the evidence, said he wanted $400 to settle the person who raided the shop. Thong Chong then reported the matter to an A.S.P. in the anti-corruption branch. As a result, $400 in ten-dollar notes were marked and, according to Thong Chong, they were handed to the appellant. This evidence was corroborated by one Leow Her Hia. Subsequently, the appellant was arrested and searched and two marked ten-dollar notes were found in his possession.

Held: the evidence did not support the conviction but the appellant could and should have been convicted of the offence of attempting to cheat.

Case referred to:—

(1) *Light* 11 Cr. App. R. 111.

CRIMINAL APPEAL.

K. K. Benjamin for the appellant.

P. G. Clough (D.P.P.) for the Public Prosecutor.

Cur. Adv. Vult.

Wilson, J.: — Lim Thong Chong is a coffee-shop keeper in partnership with five others. On the 28th January about ten persons were playing a game of cards in the back portion of the coffee-shop. A Police Lieutenant in the Criminal Intelligence Representative at Klang came and raided the shop. Some days later a Chinese, who stated he was a police inspector, went to the shop and questioned Thong Chong about the gambling. Thong Chong was very worried and someone suggested to him he should see the appellant, which he did. He told the appellant his worries and three or four days later the appellant, according to the evidence, said he wanted $400 to settle the person who raided the shop. Lim Thong Chong then reported the matter to an Assistant Superintendent of Poilce in the anti-corruption branch. As a result, $400 in ten-dollar notes were marked and, according to Lim Thong Chong, they were handed to the appellant. This evidence was corroborated by Leow Her Hia. Subsequently, the appellant was arrested and searched and two of the marked ten-dollars notes were found in his possession.

The Deputy Public Prosecutor admitted that on that evidence the accused should not have been convicted of cheating under section 420 of the Penal Code but maintained that he could and should have been convicted of attempting to cheat.

Mr. Benjamin for the appellant stated that the case upon which the Deputy Public Prosecutor relied was an English case, that the Penal Code in this country was based on the Indian Penal Code and that the English case had no application here. However, I find in the Law of Crimes, *Ratanlal and Dhirajlal Thakore*, 17th edition at page 1045 the following sentence:—

"Where a person knows that the statements made by another are false, but still acts upon them with a view to entrap that person, it will not amount to cheating but will amount to attempt to cheat."

One of the authorities quoted to support this statement is the case of *Light*[1], upon which Mr. Clough relied. In my opinion there was ample evidence in this case to support the charge of attempting to cheat and whilst the conviction under section 420 of the Penal Code must be quashed, there will be substituted for it a conviction under section 511 of the Penal Code of attempting to commit an offence contrary to section 420 of the Penal Code. I see no reason to reduce the sentence imposed of six months' rigorous imprisonment and the same will stand.

Conviction substituted.
Sentence confirmed.

NAWAB DIN v. MOHAMED SHARIFF & ORS.
and
MOHAMED SHARIFF & ORS. v. NAWAB DIN.

[O. C. J. (Thomson, J.) November 4, 1952]

[Ipoh — Civil Suit Nos. 106 & 138 of 1951]

Agreement for sale with option to re-purchase at same price — Purchaser to have profits of land — Whether agreement was agreement for sale or a mortgage.

These two suits were heard together and the claim of the plaintiff in the second suit was treated as a counterclaim to the first suit. The defendants in the first suit had obtained judgment against another party from the Japanese Court for possession of a piece of land with 3 houses subject to payment of $6,250 and interest. The plaintiff agreed to lend a sum of $7,000 to the defendants to enable the latter to satisfy the judgment debt. On December 13th, 1944 they executed an agreement and the defendants executed a Power of Attorney in favour of the plaintiff. By the agreement the defendants agreed to sell to the plaintiff one of the 3 houses and the land on which it stands in consideration of the sum of $7,000, the former remaining the registered proprietors of the land. The important terms of the agreement were that the plaintiff was to remain in possession of the house free from interference for 3 years during which period the defendants were prohibited from selling, or creating any charge on it. After the 3 years, and within 2 months after that, the defendants were to have the right to repurchase for the same price of $7,000. If the

defendants fail to exercise their right they were at the request of the plaintiff to execute a valid and registrable transfer of the house in favour of the plaintiff. The Power of Attorney merely gave the plaintiff full powers of management of the house and land.

The plaintiff now claims that this agreement was an agreement for the sale of a portion of this land to him subject to an option of repurchase. On the other hand the defendants claim that this agreement was in the nature of a mortgage and that on repayment of the loan, which under the Debtor and Creditor (Occupation Period) Ordinance now amounts to nothing, they are entitled to possession of the land as against the plaintiff.

Held: (1) the agreement and the power of attorney represent an arrangement of the nature of a mortgage to secure the original loan of $7,000 on which the profits of the land involved were to constitute the interest; (2) following **Haji Abdul Rahman v. Mohd. Hassan**[1] and **Yaacob bin Lebai Jusoh v. Hamisah binte Saad**[2], the defendants are entitled to redeem what was given as security and that that right is not affected by the stipulation that this land can only be repurchased within the time stated in the agreement.

Cases referred to:—

(1) *Haji Abdul Rahman v. Mohamed Hassan* (1917) A.C. 209. 1 F.M.S.L.R. 290.

(2) *Yaacob bin Lebai Jusoh v. Hamisah binti Saad* (1950) M.L.J. 255; (1950) M.L.R. 210.

CIVIL SUIT.

K. C. Chan for Nawab Din.

M. S. Mahendran for Mohamed Shariff & Ors.

Cur. Adv. Vult.

Thomson, J. : — These two cases concern a small portion of the land held under Grant No. 3954, Lot No. 67E. in the Township of Teluk Anson. The plaintiff in Suit No. 106 is the defendant and the defendants in that suit are the plaintiffs in Suit No. 138. It is, I think, conceded (and if it is not then I so hold) that Suit No. 138 should never have been instituted at all but that the Plaint therein should have been filed as a counterclaim in Suit No. 106, and I propose to deal with the matter on that basis.

Except as to certain ancillary matters consideration of which can be conveniently deferred until a later stage, the facts of the case are not in dispute. Prior to 2nd December, 1940, the defendants were the registered proprietors of the land comprised in Grant No. 3954 and on that date the land was transferred from them to one Emamudin Abdul Karim. That transfer and Emamudin's subsequent dealings with the land became the subject of litigation in the Japanese Courts with the details of which I am not here concerned. The event of that litigation, however, was an order by the Japanese Court dated 30th June, 1944, to the effect that subject to a payment of $6,250 together with some small amount of interest on or before 31st December, 1944, the transfer of the land to Emamudin and any subsequent dealings with the land by him should be set aside and that the Registrar of Titles should make the necessary memorials on the register to ensure that the present defendants should be registered as owners of the land free from encumbrances.

In December, 1944, the defendants had not complied with the condition as to payment in the Japanese order and apparently being anxious to do so, the 1st defendant approached the plaintiff for a loan of $7,000. The plaintiff agreed to lend and did lend this amount which is to be presumed to have been in occupation currency and on 13th December, 1944, the parties executed an agreement and the defendants executed a power of attorney in favour of the plaintiff both of which I shall discuss shortly. Briefly, to complete the narrative, however, the money was paid into Court and apparently (although there is no evidence on the point it is admitted in the Plaint) the defendants again became the registered proprietors of the land. At or about the same time, in pursuance with the agreement between the parties the plaintiff entered into possession of a portion of the land of which he is still in possession and proceeded to let the house situated upon it to a series of tenants at substantial and increasing rents which, whatever be the result of the present proceedings, will have rendered the whole transaction highly profitable to him.

In substance the plaintiff now claims that the agreement of 13th December, 1944, was an agreement for the sale of a portion of the land to him for a sum of $7,000 subject to an option of repurchase which has not been exercised in due time and therefore that he is entitled to specific performance. The defendants, on the other hand, say that the agreement was given by way of security and is of the nature of a mortgage and that on repayment of the debt, which by virtue of the Debtor and Creditor Ordinance now amounts to nothing, they are entitled to possession of the portion of the land comprised in the agreement as against the plaintiff and subject, of course, to any statutory rights of the persons in occupation as his tenants who have not been made parties to these proceedings. I am not overlooking the fact that both sides claim a number of ancillary reliefs but for the time being I propose to treat these as the bones in the fish and put them on the side of my plate.

The agreement between the parties and the power of attorney granted by the defendants in favour of the plaintiff deal with the same subject matter, both documents bear the same date and they were stamped on the same day. In my opinion they are clearly part and parcel of the same transaction.

Omitting those portions which can at this stage be regarded as immaterial, the agreement can be summarised as follows. It describes the plaintiff as the purchaser and the defendants as the vendors. Then follow a series of recitals to the effect that the vendors are the "beneficial and rightful owners" of the whole land held under Grant No. 3954 with three houses on it numbered 1042, 1043 and 1044, Makota Road, Teluk Anson, that the land in question is the subject matter of a suit in the Supreme Court which resulted in the order of that Court dated 30th June, 1944, which has already been mentioned and a copy of which is attached to the agreement, that after complying with the terms of that order the vendors "shall remain and continue to be" the registered proprietors of the land and that the purchaser has agreed to buy and the vendors have agreed to sell the house No. 1044 Makota Road with a piece of land amounting to 3,200 sq. ft. on which the house stands which is shown on an attached sketch plan at a price of $7,000. It then states that in consideration of the premises and of the sum of $7,000 paid by the purchaser to the vendors the receipt of which is acknowledged, the parties "do hereby agree to the terms and conditions set out hereunder". The vendors then agree to utilise the purchase price in complying with the Court order of 30th June, 1944, so as to enable them to become sole owners of the land free from all encumbrances and to give the purchaser possession of the house and piece of land which are shown on the annexed sketch plan in respect of which he is to collect all the rents and profits. Then follow certain provisions as to repairs, supply of water and allocation of assessment and other charges. Then follow the following provisions which as they go to the root of the matter had better be set out at length :—

7. The Purchaser shall remain in possession of the said house without any interference by any of the Vendors or persons claiming through and under them for a period of three years from the date hereof.

8. The Vendors shall not directly or indirectly deal with the said house either by sale or by charge or by way of security for the said period of three years from the date hereof.

9. After the lapse of the said period of three years from the date hereof and within two months next after that, the Vendors shall have the right to re-purchase the said house from the Purchaser for the same price of $7,000 (Dollars seven thousand only). During the said period of two months after the lapse of three years from the date hereof, the Vendors shall be at liberty to deal with the said house either by sale or charge in order only to pay to the Purchaser the said sum of $7,000 for the re-purchase of the said house and not for any other purpose.

10. In case the Vendors shall fail to exercise their rights under the preceding clause hereof, the Vendors shall at the request of the Purchaser execute a valid and registrable transfer of the said house in favour of the Purchaser without any further payment by him to them but the costs of the transfer etc. shall be borne by the Purchaser less lawyer's fees.

11. The Purchaser shall have the right to lodge a caveat under and by virtue of this agreement in respect of the said house.

The power of attorney is clearly supplemental to the agreement the existence of which it recites. It is stated to be irrevocable during its existence which is said to be for a period of three years and two months and in brief it gives the grantee, that is to say the present plaintiff, full powers of management of the house and land forming the subject matter of the agreement but gives him no power to alienate or charge the land.

In all the circumstances of the case, and particularly in view of the plaintiff's admission that the original payment of $7,000 by him to the defendants was a loan and of the fact that on the face of the agreement the amount for which the defendants are entitled to re-purchase is exactly the same as the original so-called purchase price, I have no hesitation in finding that the agreement and the power of attorney represent an arrangement of the nature of a mortgage made to secure the original loan of $7,000 by the plaintiff on which the profits of the portion of the land involved were to constitute the interest. Having come to that conclusion, it clearly follows from the decision of the Privy Council in *Haji Abdul Rahman v. Mohamed Hassan*[1] and of the local Court of Appeal in the case of *Yaacob bin Lebai Jusoh v. Hamisah binti Saad*[2] that the defendants are entitled to redeem what was given as security and that that right is not affected by the stipulation that the land can only be re-purchased within two months after the lapse of a period of three years. Counsel for the plaintiff attempted to distinguish the present case from that of *Yaacob bin Lebai Jusoh*[2] on the ground that in that case the mortgagor was the registered proprietor of the land in question whereas in the present case at the time of the loan the defendants were not registered proprietors. He quoted no authority and I fail to see that there is substance in the distinction. Subject to exceptions which have no relevance to the present case any interest in property whether vested, expectant or contingent can form the subject of an arrangement of the nature of a mortgage and the ground on which equity interferes with the exercise of the legal rights of the parties is thus simply stated in *Snell's Principles of Equity* (19th Ed. at page 291) : —

"The Courts of Equity, leaving the legal effect of the transaction unaltered, declared it to be against conscience and unreasonable that the mortgagee should retain as owner for his own benefit what was intended as a mere security."

It follows then that on repayment of the original loan the defendants are entitled to regain possession of the property which forms the subject matter of the agreement of 13th December, 1944.

Here, however, the rights of the parties are affected by reason of the provisions of the Debtor and Creditor (Occupation Period) Ordinance. By reason of section 6 of that Ordinance the debt falls to be revalued in accordance with the Schedule as on 12th August, 1945, and as the amount of it when so revalued is less than $100, nothing whatever is payable in respect of it.

The defendants then are entitled to possession of the land forming the subject of the agreement. The question of the date as at which they are entitled to possession is by no means free from doubt. As, however, there is no claim for an account of profits I do not find it necessary to consider the point and the order will therefore be for possession with effect from 12th March, 1951, the date of the filing of the Plaint in Civil Suit No. 138 of 1951.

There remain to be disposed of three minor matters arising out of the agreement between the parties.

In the first place, the agreement of 13th December, 1944, provided that the plaintiff or any tenants occupying under him the land forming the subject of that agreement should have the right to take water from a neighbouring house belonging to the defendants subject to payment of a proportion of the water rate to be agreed with the defendants. The plaintiff alleged that the defendants had refused to allow his tenants to use the water as thus provided and that he had thereby suffered loss and damage at the rate of $5 per month, that figure, according to him, being difference between the rent he actually received and the rent he would have received had the tenants been at liberty to use the water from the defendants' premises. The 1st defendant denied that he had ever prevented the plaintiff's tenants from drawing water on his premises and on this point I accept his evidence.

In the second place, the agreement provided that the defendants should carry out any repairs which the premises required as at 13th December, 1944, but that any subsequent repairs should be done by the plaintiff at his own expense. In this connection, the defendants claimed the sum of $147.85 in respect of repairs carried out by them to the latrines on the premises. As, however, there was no evidence that these repairs were not necessary as at 13th December, 1944, the claim in this connection must fail.

In the third place, the defendants claimed to be entitled under the agreement to a refund of a proportional amount of the total amount paid by them by way of quit rent and Town Board Assessment in respect of the whole of the land of which the portion of the land forming the subject of the agreement between the parties is a part. This claim has not been contested. There is, however, a lack of evidence as to the amounts involved and there will therefore be an inquiry as to the amount payable which should be one-fourth of the total amonnt paid by the defendants in respect of the period 13th December, 1944 to 12th March, 1951.

There will, then, be judgment for the defendants in Civil Suit No. 106 of 1951. In Civil Suit No. 138 of 1951 there will be judgment for the plaintiffs for possession of the land in question as against the defendant as on 12th March, 1951, and judgment for so much as may be found due to them on enquiry by the Assistant Registrar in respect of quit rent and assessment as I have already indicated.

As regards costs, these have been substantially increased by reason of the plaintiffs in Civil Suit No. 138 of 1951 instituting that suit instead of proceeding by way of counterclaim in Civil Suit No. 106 of 1951. I think justice will be done in this connection by making no order as to costs in Civil Suit No. 138 of 1951 and giving the defendants the taxed costs in Civil Suit No. 106 of 1951.

Judgment accordingly.

PUBLIC PROSECUTOR v. YEW YONG KONG.

[A. Cr. J. (Buhagiar, J.) November 24, 1952]

[J.B. — Criminal Appeal No. 21 of 1952]

Trade and Customs Enactement Johore, s. 29, 33, 34 and 35 — Forfeiture of vehicle — Criminal Procedure Code s. 407.

In this case the Public Prosecutor appealed against an order of the learned Magistrate, whereby a van which had been used for conveying uncustomed goods, was ordered to be returned to the owner. The order was made after an enquiry which was held by the learned Magistrate in which the owners of the van were asked to show cause why it should not be forfeited.

Held: (1) as the Trade and Customs Enactment contains special provisions relating to forfeiture, the provisions contained in section 407 of the Criminal Procedure Code did not apply; (2) the learned Magistrate had therefore no power to order the return of the van to the owners.

Cases referred to:—

(1) *Tan Lian v. R.* (1947) M.L.J. 196.

(2) *Lim Geok Ching v. Public Prosecutor* (1952) M.L.J. 113.

(3) *Soon Chee Keng v. Public Prosecutor* (1951) M.L.J. 86.

CRIMINAL APPEAL.

T. A. Hepworth (D.P.P.) for the Public Prosecutor.

Sardon Jubir for the respondent.